

Overview of “Draft Assessment of Existing Information for Caloosahatchee River Minimum Flows and Levels Update” dated October 12, 2010

**Item 48(a) - Beth C. Lewis
Senior Specialist Attorney
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October 14, 2010

Background

- The Conservancy of Southwest Florida filed a petition on September 3, 2010 requesting the Caloosahatchee River Minimum Flow and Level (MFL) rule be revised immediately
- MFLs establish the point at which further withdrawals will cause significant harm to the water resources or ecology of an area - 373.042, F.S.
- The District must scientifically and technically justify a MFL revision to meet applicable rulemaking standards – 120.56(2) and 120.52(8), F.S.

MFL Update – Task Status

- Staff has documented the tasks needed to update to the MFL criteria in a report entitled “ Draft Assessment of Existing Information for Caloosahatchee River Minimum Flows and Levels Update” dated October 12, 2010
- These tasks respond to the recommendations of the Peer Review Report (2000) and the District Status Update Report (2003)
- Finalizing and undertaking the following tasks in the estimated timeframes requires realignment among competing staff time and budget priorities

Key Scientific and Technical Tasks

Current Task

- **Tidal Watershed Model Development**
 - Use existing data for model development
- **Estimated Completion: October 2012**

Key Scientific and Technical Tasks *cont'd*

Tasks to be Initiated October 2011

- **Flow and Stage Data Collection, QA/QC and model calibration**

Estimated Completion: October 2012

- **Tapegrass Model Revision and Application**

Estimated Completion: April 2014

- **Ecological Analysis of Existing Data**

Estimated Completion: October 2013

- **Return Frequency Analysis**

Estimated Completion: October 2013

Key Scientific and Technical Tasks *cont'd*

- **Upon conclusion of the identified tasks:**

Document findings in a Technical Report suitable for Peer Review

Estimated Completion: October 2015

Projects Impacted if Initiate Scientific and Technical Tasks to Update MFL Criteria

- Biscayne Bay Water Resource Protection Rule
- Estero Bay MFL Rule
- Rookery Bay MFL Rule
- Model Development for Naples Bay SWIM Plan
- FP&L Turkey Point Monitoring Plan Implementation
- FP&L Turkey Point Completeness Reviews (Units 6/7)
- Caloosahatchee & St Lucie River Estuaries Watershed Protection Plan update and ongoing research and monitoring
- Caloosahatchee River Watershed Protection Plan Update (due to Legislature March 2012)

DISCUSSION

Enter a Final Order Denying the Petition of the Conservancy of Southwest Florida and Ralf Brookes to Amend Rule 40E-8.221(2) and Rule 40E-8.421(2), F.A.C.

**Item 48(b)- Beth C. Lewis
Senior Specialist Attorney
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October 14, 2010



Petition – Relief Requested

- **Petition by the Conservancy of Southwest Florida requests the Governing Board to:**
 - **Immediately initiate rulemaking to revise the Minimum Flow and Level (MFL) for the Caloosahatchee River**
 - **Initiate rulemaking to update the recovery strategy for achieving the Caloosahatchee River MFL**

Administrative Procedures Act Process Petition to Initiate Rulemaking, Sec. 120.54(7), F.S.

- **Governing Board must determine today whether to:**
 - **Accept petition and initiate rulemaking proceedings**
 - **Deny petition with a written statement of reasons for its denial**
 - **Otherwise comply with the requested action**

Background

- **Minimum Flow and Level for the Caloosahatchee River effective September 10, 2001**
- **Recovery strategies adopted at same time**
 - **required because Caloosahatchee River experiencing MFL violations**

Background con't

- **Recovery strategies state recovery will not be achieved immediately due to lack of regional storage and Lake Okeechobee operations**
 - **Recovery relies upon construction of CERP components over next 20 years**
 - **Key storage component is the CERP C-43 West Basin Storage reservoir**

Applicable Legal Authorities

- Governing Board has the sole discretion to determine when to exercise rulemaking authority absent statutory mandate – *Citizens of the State of Florida v. Mayo*, 357 So. 2d 731 (Fla. 1978)
- This discretion has been recognized for the MFL statutes and for identifying specific actions for MFL recovery strategies since MFLs are technically complex and highly infused with policy considerations – *Assn' of Fla. Community Developers v. Fla. Dep't Env't'l Regulation*, 943 So.2d 989, 992 (Fla. 1st DCA 2006)

Applicable Legal Authorities Con't

- **MFL statute requires MFL rule to be reviewed periodically and revised “as needed” - 373.041, F.S**
- **Governing Board has discretion to determine when to revise MFL rule “as needed”**
 - **No statutory provisions limit Board’s discretion so long as discretion exercised within scope of statute**
- **The District must scientifically and technically justify a MFL revision to meet applicable rulemaking standards – 120.56(2) and 120.52(8), F.S.**

Considerations - MFL

- **The Peer Review Report (2000) and subsequent District MFL Status Update Report (2003) recognized a need to update the MFL rule contingent upon:**
 - **Completion of scientific and technical tasks to support an MFL revision which must be peer reviewed – 373.042, F.S.**
 - **Tasks must be completed to support rulemaking standards**

Considerations- MFL

- **Governing Board has prioritized District resources to implement the existing recovery strategy**
- **Water reservation rule development for Caloosahatchee Estuary initiated in 2009**
 - **Rule necessary to begin construction of the C-43 West Basin Storage Reservoir**

Rule Making Priorities Since 2003

- **Florida Bay MFL (2006)**
- **Loxahatchee River MFL (2006)**
- **Lower East Coast Regional Water Availability Rule (2007)**
- **Central Florida Coordination Area (2007)**
- **LOSA Regional Water Availability Rule (2008)**
- **Picayune Strand Water Reservation (2009)**
- **St Lucie River Water Reservation (2010)**

Considerations - MFL

- District required to submit an MFL priority list and schedule to Florida Department of Environmental Protection – 373.042(2), F.S.
- District committed in 2009 to develop MFL criteria for Estero Bay and Rookery Bay by 2011 and 2012, respectively
- MFL criteria development for these water bodies is the District's priority
 - Estero Bay and Rookery Bay not covered by specific protection tool

Considerations - MFL

- **The 2008 Lake Okeechobee Regulation Schedule (LORS) projects increased flows of Lake Okeechobee water to the Caloosahatchee River**
 - **Caloosahatchee MFL target is met more often with the LORS than under WSE Regulation schedule – LORS SEIS, Appendix E, pp. 90-91**

Considerations - MFL

- **Under September 2010 Adaptive Protocols guidance for LORS implementation, the District will make recommendations to the U.S. Army Corps of Engineers on ways to further improve flows in dry times to the Caloosahatchee River**
- **AP 5.5 reduces the number of months of high salinity events compared to LORS – Adaptive Protocols, Appendix B, Fig. B-56**

Considerations - MFL

- The District placed restrictions on allowable consumptive use withdrawals from Lake Okeechobee in 2008
 - Lake Okeechobee Service Area Restricted Allocation Area Rule
 - Rule prevents increased water supply dependence beyond historical levels

Considerations – MFL Recovery Strategy

- **District adopted an overview of the MFL recovery strategy by rule when it adopted MFL in 2001**
 - **Rule places no restrictions on what the District can consider in updating recovery strategies**
- **Specific recovery strategies found in the 2005-2006 versions of the Lower East and Lower West Coast Water Supply Plans**

Considerations – MFL Recovery Strategy

- **Lower East and Lower West Coast Water Supply Plans are being updated**
 - **LWC - April 2011**
 - **LEC - September 2012**
- **No statutory requirement to adopt recovery plan by rule**
- **Petitioner's concerns can be considered and addressed through ongoing Water Supply Plan updates**

Summary - MFL

- **Governing Board has discretion to determine when to update MFL rule and recovery strategies pursuant to 373.042, F.S**
- **No statute mandates the immediate amendment of the MFL rule or the recovery strategy**
- **Additional scientific and technical tasks must be completed to support an update to the MFL**
- **District currently developing water reservation rule, implementing LOSA rule and recommending operational improvements for the Caloosahatchee River through adaptive protocols**

Summary – MFL Recovery Plan

Lower East Coast and Lower West Coast Water Supply plan updates are the appropriate forum to address petitioner's issues concerning the existing recovery strategies for the Caloosahatchee River MFL

Recommendation

Enter a final order denying the Petition of the Conservancy of Southwest Florida and Ralf Brookes to amend Rule 40E-8.221(2) and Rule 40E-8.421(2), F.A.C.